

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

for affix

77-6113
77-6127

To be argued by
FREDERICK P. SCHAFER

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket Nos. 77-6113, 77-6127

CAROL LAVENDER, as Administratrix of the Goods,
Chattels and Credits of Ronald Lavender, deceased,
JOHN M. LUGER, as Administrator of the Goods,
Chattels and Credits of John W. Luger, deceased,
Plaintiffs-Appellants,

—against—

UNITED STATES OF AMERICA,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE

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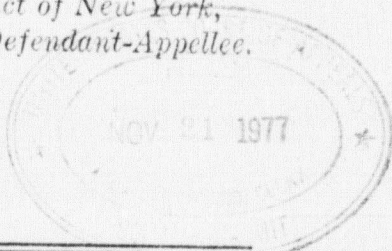




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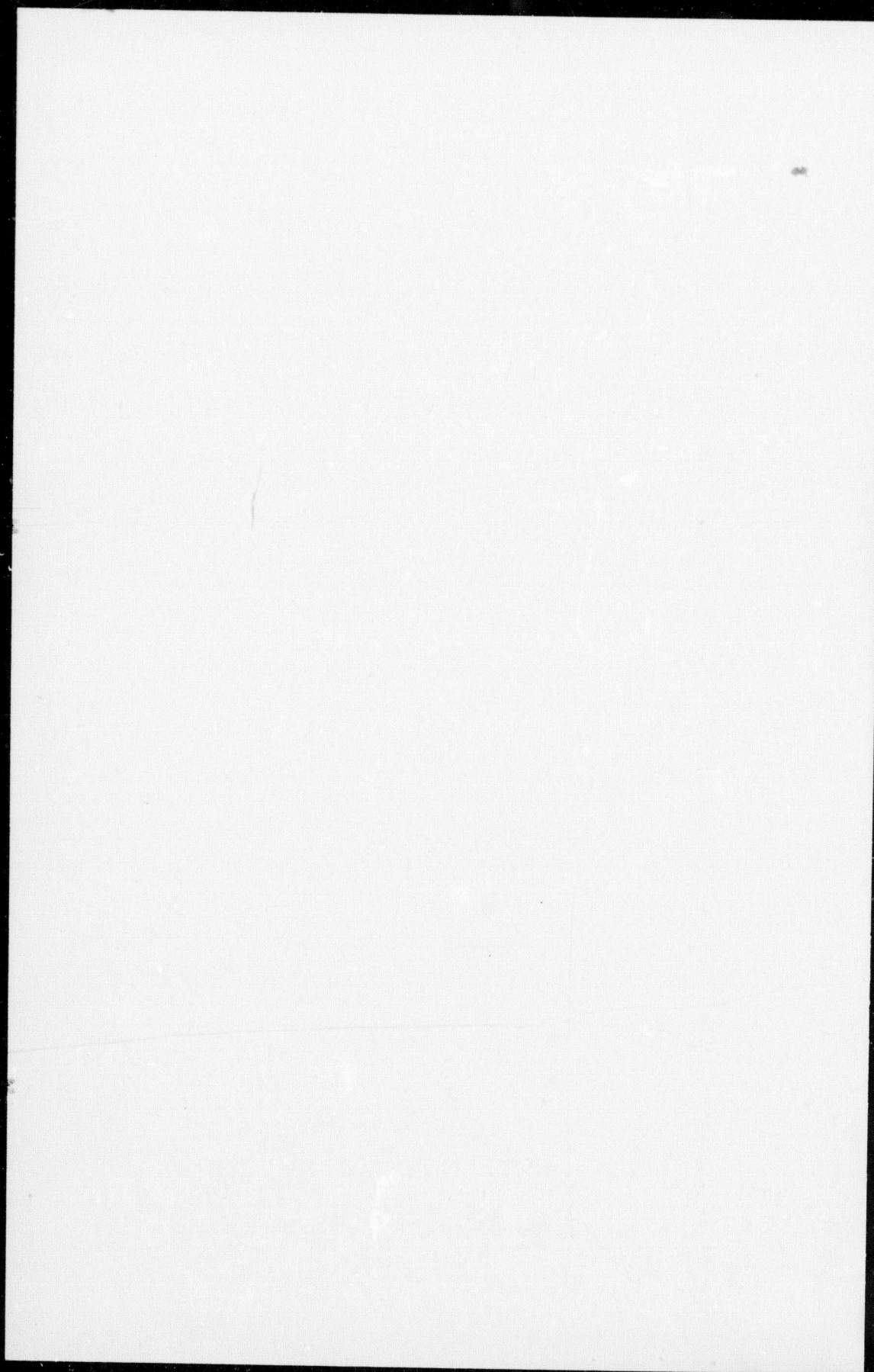
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Credits of John W. Luger, deceased,

Plaintiffs-Appellants,

—against—

UNITED STATES OF AMERICA,

Defendant-Appellee.

BRIEF OF DEFENDANT-APPELLEE

Issues Presented

1. Is the District Court's finding that there was insufficient evidence of conscious pain and suffering by the decedent John W. Luger clearly erroneous?
2. Is the District Court's award for the wrongful death of John W. Luger clearly erroneous?
3. Did the District Court err in dismissing appellant Carol Lavender's claim for loss of consortium?
4. Is the District Court's award for the wrongful death of Ronald Lavender clearly erroneous?
 - a. Did the District Court err in deducting income taxes in computing the award to appellant Carol Lavender for loss of support, and if not, was the amount so deducted excessive?

b. Is the discount rate employed by the District Court clearly erroneous?

c. Is the District Court's failure to increase decedent Ronald Lavender's future earnings for the possibility that he would have been promoted to foreman clearly erroneous?

d. Is the District Court's refusal to make an award for the loss of decedent Ronald Lavender's household services clearly erroneous?

Statement of the Case

This is an action under the Federal Tort Claims Act for damages arising out of the deaths of Ronald Lavender and John W. Luger. The complaint, filed on July 20, 1975, alleges four causes of action. In the first and second causes of action, appellant Carol Lavender seeks damages for the wrongful death of her husband Ronald Lavender and for his conscious pain and suffering prior to death. Similarly, in the third and fourth causes of action, appellant John M. Luger seeks damages for the wrongful death of his son John W. Luger and for his conscious pain and suffering prior to death. On October 21, 1975, the United States filed its answer, and on October 29, 1975, the United States filed a third-party complaint against Consolidated Edison Company of New York, Inc. seeking contribution and indemnification. An answer to the third-party complaint was filed on January 6, 1976.

Pursuant to a pretrial order entered upon the consent of the parties, the United States dismissed its third-party action and admitted its liability to appellants. At that time appellant Lavender amended her complaint to add a cause of action for loss of consortium. The issue of damages was tried without a jury before the Honorable Richard Owen, on January 18-20, 1977, and post-trial oral argument was heard on February 2, 1977.

In its opinion filed on April 28, 1977 (437a-44a), the District Court awarded \$17,063.34 to appellant Luger for the wrongful death of his son; no award was made for conscious pain and suffering. In addition, the District Court awarded appellant Lavender \$369,346.92 for the wrongful death of her husband and \$15,000.00 for his conscious pain and suffering. Accordingly, a judgment (#77,779) was entered on June 15, 1977 (445a-46a). On July 12, 1977 appellants filed their notice of appeal, and on August 12, 1977, the United States filed its notice of appeal.

Statement of Facts

On October 31, 1974, decedents Luger and Lavender, employees of Consolidated Edison of New York, Inc., were struck and killed by a United States Postal Service truck that was negligently operated. The background facts relevant to the computation of damages are largely undisputed and are set forth in the District Court's opinion (437a-39a). To the extent that there are factual disputes relating to the issue of damages, they will be discussed in the Argument below.

ARGUMENT

POINT I

The District Court's Finding That There Was Insufficient Evidence Of Conscious Pain And Suffering By Luger Is Not Clearly Erroneous.

Rule 52(a) of the Federal Rules of Civil Procedure provides that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." A finding is "clearly erroneous" when "although there is evidence to support it, the reviewing court on the entire evidence is left with the

definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). This Court has held that "it is clear that a trial court's findings as to damages are to be accorded just as much weight on review as other findings of fact." *Cunningham v. Rederiet Vindeggen A/S*, 333 F.2d 308, 312 (2d Cir. 1964). The Court below found insufficient evidence of conscious pain and suffering by Luger to justify an award (439a). That finding is not clearly erroneous.

Appellant Luger challenges that finding on three grounds. First, appellant points to the testimony of Anthony Church, one of Luger's co-workers, that while Luger was pinned between the two vehicles, the coffee stirrer in his mouth continued to rotate and there was some movement of his eyes (15a-16a). However, Sebastian Sperra, Luger's supervisor, also observed him at that time and testified that he did not observe a straw or stirrer in Luger's mouth (40a). In any event, New York law is clear that the mere movement of the head, jaw, or limb is insufficient to sustain an award for conscious pain and suffering. *Parker v. McConnell Manufacturing Co., Inc.*, 40 A.D. 2d 587, 334 N.Y.S. 2d 586 (4th Dept. 1972).

Second, appellant relies on the testimony of police officer Michael Cseh that he heard Luger moan when he was placed on the stretcher (197a) and of Sperra that he heard a "slight noise coming out of his mouth" in the ambulance on the way to the hospital (37a). However, the moan which officer Cseh heard lasted only a couple of seconds (199a) and was similar to the sound he had heard on other occasions at the moment a person expired (200a). Similarly, Sperra was uncertain as to the nature of the sound he heard stating that "I don't know if he was breathing or the last breath or what" (38a). Moreover, Sperra's ability to observe Luger and accurately recall what he observed in the ambulance is questionable, because during the trip to the hospital Sperra "was crying like hell" (38a). Although there is dicta in two New York cases that evidence of "moaning and groaning like he was

in pain" is sufficient to sustain a finding of conscious pain and suffering, *Parker v. McConnell Manufacturing Co., Inc.*, *supra*; *Kinner v. Kuroczka*, 12 A.D. 2d 383, 212 N.Y.S. 2d 479, 482 (3d Dept. 1961),* it does not follow that even such clear evidence of moaning requires such a finding. It therefore follows *a fortiori* that no such finding is required where, as here, the testimony concerning the sounds coming from a dying man is inconclusive as to whether he was both conscious and in pain.

Third, appellant argues that the nature of Luger's injuries require a finding of pain, suffering, and fear of death. However, appellant thus completely begs the question of Luger's consciousness. The autopsy report (PX-9) states as the cause of death "[f]ractures of skull and extremities, contusions and lacerations of brain, spleen and mesentery." In view of the likelihood of shock caused by such injuries and the failure by appellant to sustain his burden of showing conscious pain and suffering, the District Court's finding as to this claim is not clearly erroneous.

POINT II

The District Court's Award For The Wrongful Death Of Luger Is Not Clearly Erroneous.

The District Court awarded \$15,000 for the loss of economic support to appellant Luger as a result of the wrongful death of his son. That award was based on the Court's finding that the decedent would have married, moved away, and ceased contributing to his parents' support within several years and that thereafter their need for a resumption of support from him would seem doubtful in light of his father's good health and earnings and

* Appellants' reliance on *Ramos v. City of New York*, 56 A.D. 2d 763, 392 N.Y.S. 2d 292 (1st Dept. 1977) is completely misplaced, since in that case there was clear and indisputable evidence of consciousness.

the possibility of contributions by the other children (438a). Appellant's challenge to this award as clearly erroneous is completely without merit.

The evidence established that at the time of his death, Luger was contributing about \$30 per week to the support of his family (48a) and had been contributing in somewhat lesser amounts since 1972 (48a-49a, 65a). Those contributions were necessitated by appellant's having changed jobs and thereby suffered a reduction in earnings (65a-66a). Luger also performed a modest amount of household services (55a-56a, 81a-82a). However, Luger's contributions of money and services were partly offset by the meals and laundry services he enjoyed at home (69a-70a), as well as the clothing which his parents bought for him (72a). More importantly, appellant testified that at such time as his son married, he anticipated that he would move away and that all such contributions would cease unless appellant became injured or sick (67a-68a). Appellant's testimony also revealed that appellant is in good health (58a), has a well-paying job with automatic salary increases over time (59a-61a), has health, pension, and life insurance coverage (63a-64a), owns his own home (64a), and has six other and younger children from whom he anticipates support (66a).

Despite this evidence, appellant argued below and maintains on this appeal that the loss of support should be computed on the basis of a fixed percentage of Luger's projected gross earnings over the lifetime of his parents. As the District Court recognized, that approach assumes that "Luger would have lived at home for the rest of his parents' lives and would have continued to contribute to their support" (438a).^{*} The Court held, however that "I

^{*} That contention also assumes the continuation of Luger's contributions as a fixed percentage of his income based upon a two-year sample, which appellant's expert Dr. Berenson described as "less than I would call good" (233a).

am unable to reach such a conclusion, finding rather, that it is the greater possibility that a healthy young man of 20 would marry within the next several years, and thereafter need all of his income for his own growing family" (438a). Similarly, based on the above-described evidence, the Court concluded with respect to the possible resumption of support by Luger that "I do not see with sufficient clarity the parents' need for such support money in the future or, if the need there be, why it could not be furnished by other unmarried children coming along" (438a). These findings are not clearly erroneous and support the Court's conclusion that the pecuniary value of the loss of support and services which appellant could reasonably have expected from his son, reduced to present value, is \$15,000. See *Jones v. United States*, 304 F. Supp. 94, 98-99 (S.D.N.Y. 1969), *aff'd* 421 F.2d 835 (2d Cir. 1970) (*per curiam*), where this Court affirmed an award of \$15,410.28 for the pecuniary loss sustained by the parents in the death of their 17-year old son whose contributions would have started at \$25 per week and as to whom the District Court found that matrimony was a reasonable probability by his late 20's.

Nor can that award be challenged by comparing it to verdicts or appellate decisions in other cases. As this Court noted in *Batchowsky v. Penn Central Co.*, 525 F.2d 1121, 1125 (2d Cir. 1975), "the differentiating factors in each case with respect to pain and suffering, anticipated work life expectancy, permanency of disability and other relevant factors, limit the precedential value of a court's treatment of awards in other apparently similar cases." For example, in *Hart v. Forchelli*, 445 F.2d 1018 (2d Cir. 1971), one of the cases upon which appellant relies, the plaintiff, decedent's mother, was earning \$75 per week and had been abandoned by her husband, and the decedent had stated his intention to support her as soon as he finished college. Furthermore, with respect to such appellate cases reviewing the trial court's decision on a motion for a new trial unless an award is remitted, the ap-

pellate court has only a very narrow scope of review; thus, the fact that a particular verdict is not held to be "grossly excessive" does not necessarily mandate the same result in another case. Finally, with respect to the comparison that appellant urges to various state verdicts and appellate decisions, it is sufficient to observe as this Court did in *Hart v. Forchelli, supra*, at 1019, that "it is not particularly helpful to examine numerous state cases since federal juries are not bound by the amount that New York juries have awarded or New York courts have approved."

POINT III

The District Court Correctly Dismissed Appellant Lavender's Claim For Loss Of Consortium.

In the Pretrial Order, appellant Lavender included for the first time a claim for loss consortium arising out of the death of her husband. The District Court dismissed that claim as contrary to the provisions of Section 5-4.3 of the New York Estates, Powers and Trusts Law (443a). That holding represents a correct application of New York law as embodied in the applicable statute and as interpreted by the courts.

As the Court below noted, "[a] wrongful death action in New York is a creature of statute, being unknown at common law. Damages thereunder are thus governed and limited by Estates, Powers and Trusts Law § 5-4.3 to ' . . . compensations for the *pecuniary* injuries . . . ' (underscoring supplied)" (442a-43a). In interpreting that statute and its predecessors, the New York courts have consistently held that no recovery can be obtained for the loss of a decedent's society and companionship. *Tilley v. Hudson River R.R. Co.*, 24 N.Y. 471, 476 (1862); *Sternfels v. Metropolitan St. Ry. Co.*, 73 App. Div. 494, 77 N.Y.S. 309, 315 (1st Dept. 1902); *Arnold v. State*, 163 App. Div. 253, 148 N.Y.S. 479, 486 (3d Dept. 1914);

O'Neil v. State, 66 Misc. 2d 936, 323 N.Y.S. 2d 56, 65 (Ct. Cl. 1971); *Lewis v. State*, 112 Misc. 667, 183 N.Y.S. 653, 656 (Ct. Cl. 1920), *rev'd on other grounds*, 197 App. Div. 712, 189 N.Y.S. 560 (3d Dept. 1921), *aff'd*, 234 N.Y. 587 (1922); *Wall v. Wansen*, 24 Misc. 2d 132, 203 N.Y.S. 2d 938 (Sup. Ct., Nas. Cty. 1955); see also *Campbell v. Westmoreland Farms, Inc.*, 270 F. Supp. 188, 1970 (E.D.N.Y. 1967), *appeal dismissed*, 403 F.2d 939 (2d Cir. 1968); *Archambeault v. Draper*, 101 F. Supp. 1004 (E.D.N.Y. 1951). Thus, in a wrongful death action under New York law, apart from funeral expenses, recovery is limited to the pecuniary value of the loss of support, household services, and parental care and guidance.

Appellant contends, however, that a contrary result is mandated by the holding in *Martins v. Ford*, 53 A.D. 2d 887, 385 N.Y.S. 2d 620 (2d Dept. 1976). In that case the Appellate Division reversed the lower court and ordered the dismissal of the cause of action to recover damages for loss of consortium arising out of the alleged wrongful death of plaintiff's husband on the ground that there was presently pending another action between the same parties for the same claim. However, a bare majority of the Court, in what is clearly dictum, also indicated their agreement with the lower court's conclusion that plaintiff, suing individually and as the administratrix of her husband's estate, had a valid claim for loss of consortium. In a concurring opinion, two justices of the Second Department pointed out that this dictum conflicts with the clear language of Section 5-4.3 and is not supported by the decision in *Millington v. Southeastern Elevator Co.*, 22 N.Y. 2d 498, 293 N.Y.S. 2d 305 (1968), which the majority had cited. Furthermore, the concurring justices noted that the Wrongful Death Acts of ten other states, unlike that of New York, specifically provide for recovery for loss of consortium but that the New York legislature had failed to so amend its Wrongful Death Act. The District Court was therefore en-

tirely correct in concluding that the dictum in the *Martins* case does not represent the law of New York.

Appellant also places great weight on the decision in *Millington v. Southeastern Elevator Co.*, *supra*. In that case, the Court of Appeals rejected its earlier view that only a husband could recover for loss of consortium and permitted such recovery by a wife whose husband had been paralyzed as the result of an elevator accident. Since *Millington* was an action at common law and not one for wrongful death under Section 5-4.3 of the Estates, Powers and Trusts law, its holding is irrelevant to the issue raised on this appeal. Nevertheless, appellant contends that *Millington* establishes that loss of consortium constitutes a "pecuniary" injury. This is sheer sophistry. While the Court in *Millington* held that such "sentimental damages" could be measured in pecuniary terms for the purpose of arriving at an award, 22 N.Y. 2d at 507, it does not follow that they are pecuniary in nature within the meaning of New York's wrongful death statute. On the contrary, the *Millington* decision makes abundantly clear that loss of consortium "embraces such elements as love, companionship, affection, society, sexual relations, solace and more," 22 N.Y. 2d at 502, and that the holding is based on the "growing recognition that the law of torts must recognize the interests of persons in the protection of essentially emotional interests." 22 N.Y. 2d at 507. However, it is precisely such "emotional interests" which the New York legislature intended to exclude from consideration under Section 5-4.3 of the Estates, Powers and Trusts Law. Thus, the District Court properly dismissed appellant's claim for loss of consortium under that statute.

The fact that recovery is permitted for loss of parental care and guidance does not in any way indicate a contrary result. In *Tilley v. Hudson River R.R. Co.*, *supra*, 24 N.Y. at 476, where the New York Court of Appeals first held that the pecuniary value of the loss of parental care

and guidance may be recovered in a wrongful death action, the Court clearly limited its holding to that claim for relief and specifically excluded from the coverage of the Wrongful Death Act "those losses which result from the deprivation of the society and companionship of relatives." Since *Tilley*, the New York courts have adhered to this distinction, permitting recovery for the loss of parental care and guidance, but not for loss of society or companionship. *E.g. Sternfels v. Metropolitan St. Ry. Co.*, *supra*, 77 N.Y.S. at 313-15; *O'Neil v. State*, *supra*, 323 N.Y.S. 2d at 65; *Lewis v. State*, *supra*, 193 N.Y.S. at 656. Nevertheless, appellant suggests that there is a pecuniary aspect to the loss of her husband's society and companionship in that appellant may incur additional social expenses. Even if this argument were not foreclosed by New York law, there is simply no support in the record for such a claim of pecuniary injury.

POINT IV

The District Court's Award For The Wrongful Death Of Lavender Is Not Clearly Erroneous.

The District Court awarded appellant Lavender \$369,346.92 for the wrongful death of her husband. This total award is generally consistent with the evidence and the applicable law and should be affirmed. As will be demonstrated below, all of appellant's challenges to that award are without merit. However, as will also be shown, the District Court erred in several respects in its analysis so as to overvalue that award. The United States does not urge these errors as independent grounds for reversal; however, the amount by which they overvalue appellant's damages more than offsets any of the errors asserted by appellant. Thus, to the extent that this Court finds merit in any of appellant's contentions, it should hold such errors to be harmless, or in the alter-

native, it should remand the case to the District Court to redetermine the award free of all such offsetting errors.

A. The District Court Properly Deducted Income Taxes In Computing Appellant's Loss of Support Although the Amount So Deducted Was Inadequate.

In computing the loss of earnings based on Lavender's estimated net income after taxes, the District Court correctly applied both state and federal law. In actions under the Federal Tort Claims Act, the United States is liable "in the same manner and to the same extent as a private individual under like circumstances. . . ." 28 U.S.C. § 2674. Thus, as a general matter, the computation of damages is governed by the applicable state law. As this Court noted in *Cunningham v. Rederiet Vindeggen A/S*, *supra*, 333 F.2d at 313, as of 1964 the courts of New York had not yet ruled on whether to use a decedent's gross or net income to compute the damages resulting from a wrongful death. However, in *Zaninovich v. American Airlines, Inc.*, 26 A.D. 2d 155, 271 N.Y.S. 2d 866, 872 and 874 (1st Dept. 1966), the Court, in an opinion by then Justice Breitel, ruled on the excessiveness of an award in a wrongful death action by reference to what the decedent would have actually contributed to the support of his family after taxes. See also *Neff v. United States*, 282 F. Supp. 910, 923-24 (D.D.C. 1968), *rev'd on other grounds*, 420 F.2d 115 (D.C. Cir. 1969), *cert. denied*, 379 U.S. 1066 (1970). Thus, to the extent that this action is governed by New York law with respect to the computation of damages, the District Court properly followed that law in using Lavender's net income.

Furthermore, although the Federal Tort Claims Act generally incorporates the applicable state law with respect to damages, it specifically prohibits the award of

punitive damages. 28 U.S.C. § 2674. In *Felder v. United States*, 543 F.2d 657, 665-71 (9th Cir. 1976), in a thorough and scholarly opinion by Judge Palmieri (sitting by designation), the Court held that this prohibition on punitive damages was intended by Congress to prevent the award to a plaintiff of an amount greater than the financial support he would have received in the normal course of events. The Court therefore concluded that notwithstanding state law to the contrary, the failure to deduct for income taxes was error in a Federal Tort Claims Act case. That conclusion accords with the earlier holding of this Court in *O'Connor v. United States*, 269 F.2d 578, 584-85 (2d Cir. 1959), that "[t]he compensatory nature of the right to damages under the Tort Claims Act requires such consideration of Federal Income Taxes; the plaintiff-appellee can recover only for losses sustained."* But see *Montellier v. United States*, 315 F.2d 180, 186 (2d Cir. 1963), a Federal Tort Claims Act case applying Massachusetts law, where this Court affirmed the District Court's refusal to deduct for taxes.

Relying on this Court's decision in *McWeeney v. New York, N.H. & H.R.R. Co.*, 282 F.2d 34, 38-39 (2d Cir.) (*en banc*), *cert. denied*, 364 U.S. 870 (1960), and the cases following it, appellant contends that it was error for the District Court to compute loss of earnings based on net rather than gross income. In *McWeeney* this Court held that a deduction for taxes is not appropriate where the question is one of federal law or the applicable state law is silent,** and the decedent's earnings were in the

* The Court went on to add that "[t]here is also an indication that 'take home' pay is considered the proper basis of earnings on the issue of damages in Oklahoma", whose law applied in *O'Connor*. 269 F.2d at 585.

** *McWeeney* was an action under the Federal Employers' Liability Act. The Court distinguished its decision in *O'Connor v. United States*, *supra*, on the ground that it was based on the application of Oklahoma law.

"lower or middle reach of the income scale, where future income is fairly predictable, added exemptions or deductions drastically affect the tax and, for the reasons indicated [the failure to take into account future inflation], the plaintiff is almost certain to be undercompensated". The Court added in connection with the distinction between those cases where it was appropriate to deduct for taxes and those where it was not: "Just where the line should be drawn must be left, as so much is, to the good sense of trial judges, whether acting with a jury or without". *Id.* at 39.

There is nothing in either the holding or underlying analysis of *McWeeney* which supports appellant's argument that it was error for the District Court to deduct for taxes in this case. In the first place, *McWeeney* is premised upon the silence of the applicable state law, as well as the absence of federal statutory law, whereas here New York law authorizes, and the Federal Tort Claims Act requires, the use of net income in computing loss of earnings. Furthermore, *McWeeney's* analysis of the tax issue was also premised on its holding that the damage award could not reflect future inflation. 282 F.2d at 38. In this case, however, the District Court did take future inflation into account by applying a discount rate of only 2% (440a, n. 3). See Point IV B. below, pp. 17-19. Thus, a large part of the rationale for denying a deduction for taxes is not applicable here.

In addition, even if *McWeeney* were not clearly distinguishable from this case, its holding does not support the contention that the District Court's decision to deduct for income taxes is reversible error. As this Court held in *McWeeney, supra*, 282 F.2d at 39, and reaffirmed in *LeRoy v. Sabena Belgian World Airlines*, 344 F.2d 266, 276 (2d Cir. 1965), it is within the sound discretion of the trial court to determine if the future earnings of the decedent are such as to warrant a deduction for income

taxes.* In *LeRoy* this Court affirmed as a proper exercise of the District Court's discretion the deduction for income taxes where plaintiff's future income would average \$16,000 per year. Since that is precisely the same gross annual earnings that the Court below found Lavender would have made (439a),** its deduction for taxes was not an abuse of its discretion.***

Finally, this Court's concern in *McWeeney*, *supra*, 282 F.2d at 39, as to the speculative nature of any estimate of future taxes is not applicable in this case in view of the expert testimony of the Government's expert witness.

* Indeed, in every case but one in which the issue has been raised, this Court has affirmed the determination of the District Court to deduct or not to deduct taxes. *Stokes v. United States*, 144 F.2d 82, 87 (2d Cir. 1944); *McWeeney v. New York, N. H. & H. R. R. Co.*, *supra*; *Montellier v. United States*, *supra*, 315 F.2d at 186; *LeRoy v. Sabena Belgian World Airlines*, *supra*; *Petition of Marina Mercante Nicaraguense, S.A.*, 364 F.2d 118, 125-26 (2d Cir. 1966). The sole exception was *Cunningham v. Rederiet Vindeggen A/S*, *supra*, 333 F.2d at 313-15, where the analysis was based less on *McWeeney* than on the earlier holding in *Stokes v. United States*, *supra*, that taxes should never be deducted, because they are too conjectural.

** Although the District Court found that Lavender was earning \$16,000.00 at the time of his death (439a), the evidence shows that his gross annual earnings at that time were somewhat less (208a, 217a, 324a). The District Court implicitly recognized this when it computed Lavender's loss of earnings from the date of his death to the date of the opinion (440a, n. 2). The \$16,000.00 figure was rather the District Court's estimate of the salary that Lavender would have received under the collective bargaining agreement in effect at the time of the trial. (PX-17; 222a). Thus, that amount represents an approximation of Lavender's future annual earnings without considering possible increases under new collective bargaining agreements. Appellant does not challenge that finding.

*** If the Court had accepted the analysis of Dr. Berenson and calculated Lavender's future earnings on the basis of a 7% annual increase, during his last year of work, Lavender would have been earning \$180,000 (260a). Surely appellant does not claim that this income is in the low to middle range of the income scale.

As Dr. Fitzgerald testified, the exemptions available to Lavender were fixed, and it is a relatively simple task to determine his probable future deductions based on statistical data published by the Internal Revenue Service (288a-91a, 363a-64a).^{*} See *Felder v. United States*, *supra*, 543 F.2d at 672-73, where the Ninth Circuit approved this very method for estimating future taxes. Thus, the deduction for taxes is no more speculative in a case such as this one than consideration of many other factors which are routinely included in wrongful death awards. As this Court held in *O'Connor v. United States*, *supra*, 269 F.2d at 584:

It has been said that future taxes are too uncertain to admit of advanced computation. But it is wholly unrealistic to suppose that, at any time within the limits of the years the deceased could reasonably have been expected to live, either the discontinuance or substantial reduction of Federal Income Taxes would occur. The deceased, as a salaried employee, never had in his own hands the amount withheld from his earnings for Federal Income Tax purposes; and his wife and child could have no direct benefit from that part of his earnings. While mathematical certainty is not possible, any more than it is in a prognosis of life expectancy and future earnings, nevertheless, an estimate may be made based generally on current rates, from which there should be computed the future income of the deceased after payment of Federal Income Taxes rather than before.

^{*} By using "Statistics of Income, Individual Income Tax Returns", one is able to determine the average deductions for a household of a given size and income both in itemized and standard deduction returns. By then using a weighted average, depending on the respective percentages of households with those characteristics who take standard and itemized deductions, one can arrive at a fair estimate of future deductions for such a household.

For the above reasons, the District Court correctly deducted taxes from the future loss of earnings to arrive at its award. However, the amount so deducted was clearly inadequate. Despite appellant's assertion to the contrary (Appellants' Brief, p. 31), the amount of that deduction was *not* over 30% of gross earnings. As the District Court made clear, its reduction of Lavender's future annual earnings from \$16,000 to \$11,000 was for *both* deductions for taxes *and* that share of net income attributable to Lavender's own personal expenditures (439a-40a and n. 3). Dr. Berenson estimated that Lavender's personal expenditures would have accounted for 25.8% of his earnings during his life span (210a); in Dr. Fitzgerald's opinion, that figure would have been 35-40% (370a). Even accepting the lower estimate, however, the District Court appears to have deducted no more than \$1,100 per year in taxes, or less than 7% of gross annual earnings. In view of the fact that Lavender would have had to pay city and state as well as federal income taxes, that deduction was unreasonably low.* See *Neff v. United States*, *supra*, 282 F. Supp. at 924, where the District Court deducted 20% from gross earnings for federal income taxes alone in computing the net loss of earnings of a decedent whose annual earnings would have ranged from \$10,000 to \$30,000.

B. The Discount Rate Employed By The District Court Is Not Clearly Erroneous.

In discounting to present value its award for loss of future earnings the District Court used a rate of 2%

* Based upon a projected annual wage increase of 7%, Dr. Fitzgerald testified that Lavender's average annual rate for city, state, and federal income taxes over his entire work life would have been 37-38% (368a). Since the District Court allowed only for inflationary wage increases in the amount of 4% per year, Dr. Fitzgerald's estimate would have to be somewhat reduced. It should be noted, however, that Dr. Fitzgerald did not also include Federal Insurance Contribution Act taxes which would have further reduced Lavender's net income.

which it found to be the rate of return for the use of money in an inflation-free economy (440a, n.3).^{*} By reducing the discount rate from 6%, which appellant's expert Dr. Berenson testified would be appropriate (172a), to 2%, the District Court in effect gave appellant the benefit of future inflationary wage increases of 4% per year. Appellant now contends that even a 2% discount rate is excessive and indeed that the Court below should have *increased* future earnings by 1%. Although directed at the discount rate, the underlying point of appellant's claim is that the District Court failed to consider fully the probable future wage increases which Lavender would have received. This argument is based on the historical evidence that the wages of utility workers have been increasing at the rate of approximately 7% per year (165a-66a, 345a) and the purported testimony of Dr. Fitzgerald that of this 7%, 4% is attributable to inflation and 3% to productivity increases. Whether viewed as a challenge to the discount rate adopted by the District Court or to its calculation of Lavender's future wage increases, this argument fails for two basic reasons.

First, New York Law is clear that future inflation should not be considered in computing a decedent's future earnings. *Zaninovich v. American Airlines, Inc.*, *supra*, 271 N.Y.S. 2d at 872. But see *Lucivero v. Long Island R.R. Co.*, 22 Misc. 2d 674, 200 N.Y.S. 2d 728 (Sup. Ct., Kings Cty. 1960). New York law on this question thus accords with this Court's view of federal law. *Yodice v. Koninklijke Nederlandsche Stoomboot Maatschappij*, 443 F.2d 76, 79 (2d Cir. 1971); *McWeeney v. New York, N.H. & H.R.R. Co.*, *supra*, 282 F.2d at 38.^{**} See also

^{*} Similarly, the loss of fringe benefits (including pension and medical benefits) was discounted by only 2% in order to take into account future inflation (442a and n.6).

^{**} This Court's decision in *Feldman v. Allegheny Airlines, Inc.*, 524 F.2d 384, 389-90 (2d Cir. 1975) is not *contra*, since that case involved the application of Connecticut Law.

Higginbotham v. Mobil Oil Corp., 545 F.2d 422, 434-35 (5th Cir. 1977); *Hoffman v. Sterling Drug, Inc.*, 485 F.2d 132, 143 (3d Cir. 1972). In this case, however, the District Court did take future inflation into account by reducing the discount rate from a level which reflects the current and reasonably anticipated rate of interest to that which the Court found would be the rate of interest in an inflation-free economy. In so doing, the Court erred as a matter of law.* Thus, to the extent that the Court below may also have erred in failing to take into account the asserted 3% productivity increases, such error was clearly harmless.

Second, appellant's claimed entitlement to an additional 3% reduction of the discount rate presumes that it was clearly erroneous for the District Court not to find that Lavender's earnings would have increased at the rate of 7% per year, that only 4% of that figure is attributable to inflation, and that the proper discount rate before taking such increases into account was 6%. However, none of those findings was required by the evidence in the record.

Although used by both experts, the 7% yearly wage increase is merely a forecast based on past trends that the Court was free to reject as too speculative. As the Court reasoned in *Johnson v. Serra*, 521 F.2d 1289, 1294 (8th Cir. 1975):

It must be recognized that trends may often be faulty indicators of the future as well as the present and that economists have fared only slightly better than fortune tellers and soothsayers in foretelling the future. Economic factors operate at varying degrees of intensity in our economy, and

* This error is not necessarily offset by the deduction for taxes, since as shown above, that deduction was inadequate.

it seems there are as many explanations of past trends and predictions of future trends as there are economists.

In addition, the use of the 7% yearly wage increase produces an annual salary at the end of Lavender's work life of \$165,000 to \$180,000 (260a, 343a). With all due respect to the experts, however, the District Court, as the trier of fact, was not obliged to put aside its common sense and could therefore reject such a straight-line projection at the rate of 7% as being unrealistic.

As to the percentage of any future wage increases which would be due to productivity gains rather than inflation, Dr. Fitzgerald stated on cross-examination by appellant's counsel that he was not familiar with the statistics on the average increase in the real wages of American workers generally, "but I could hazard a guess to say real wages have increased two to four percent per year" (351a). Such evidence is a rather thin reed upon which to base a claim that *Lavender's* real wages would have increased 3% per year. An award for future increases in earnings must, after all, be based on more than mere speculation. *Rogow v. United States*, 173 F. Supp. 547, 561 (S.D.N.Y. 1959). Since appellant introduced no evidence to establish what the future real wage increases will be with specific reference to Con Edison mechanics in New York City, the District Court's refusal to take into account the claimed 3% yearly increase is not clearly erroneous.

Finally, the District Court was not bound by Dr. Berenson's opinion that the discount rate should be 6%, for Dr. Fitzgerald testified that the gross rate of interest

on long-term investments could remain as high as $7\frac{1}{2}$ to 8% (304a).*

In sum, the District Court's use of a net discount rate of 2% tends to overestimate, rather than underestimate, appellant's loss of support and is not clearly erroneous.

C. The District Court's Failure To Increase Lavender's Future Earnings For The Possibility That He Would Have Been Promoted To Foreman Is Not Clearly Erroneous

Appellant contends that the estimate of Lavender's future earnings should also be increased to account for the possibility he would have become a foreman. This is not a case, however, where the claimed advancement is automatic based on a fixed number of years of service. Rather, the promotion to foreman is left to the discretion of the employer based upon consideration of such factors as length of continuous service, knowledge, training, ability, skill and efficiency, physical fitness, and attendance record (128a-29a). Furthermore, Sperra testified that he became a foreman after 20 years of service, and then only after having received special training and education (31a, 39a-40a). In view of these factors, it is sheer conjecture whether (or when) Lavender would have been promoted to foreman. Although Sperra testified that "50 to 60 percent [of class A mechanics] should make foreman" (32a), no statistical evidence was introduced to support this guess. Moreover, Thomas Caulfield, busi-

* By "gross rate of interest," Dr. Fitzgerald was referring to the return on the use of money before taxes (304a). Since in his analysis, Dr. Fitzgerald deducted taxes from his computation of future earnings, he used a discount rate of only 5%, which he stated was the "net rate of interest", i.e., the rate of interest one would receive after having paid taxes (303a).

ness agent for the union, who would presumably be in a better position to estimate the percentage of A mechanics who become foreman, stated that he had no idea (94a). The District Court was therefore entirely correct in omitting any consideration of this factor in its calculation of future earnings.

D. The District Court's Refusal To Make An Award For The Loss of Lavender's Household Services Is Not Clearly Erroneous.

With respect to appellant's claim for the loss of her husband's services, the District Court found that "since I conclude that on this record Mr. Lavender was a net consumer of household services, and there being no overall increase in the cost of such services proven, I make no award under this rubric" (442a). That result is correct both legally and factually.

It is well established that in computing the loss of support, a court is to deduct for the personal expenditures of the decedent. *E.g. Renaldi v. New York, N.H. & H.R.R. Co.*, 230 F.2d 841 (2d Cir. 1956). Similarly, in determining the loss of services resulting from the death of a child, a deduction must be made for the cost that would have been incurred for the child's maintenance. *E.g., Keenan v. Brooklyn City R.R. Co.*, 145 N.Y. 348 (1895); *Fornaro v. Jill Bros.*, 42 Misc. 2d 1031, 249 N.Y.S. 2d 833, 839 (Sup. Ct., Kings Cty.), *rev'd on other grounds*, 22 A.D. 2d 695, 253 N.Y.S. 2d 771 (2d Dept. 1964); *aff'd*, 15 N.Y. 2d 819, 257 N.Y.S. 2d 938 (1965). Both such deductions involve a determination of the net loss of support of services, that is, the loss after excluding the expenses which the decedent's presence would have added to those of the household. By the same token the household services rendered by an adult decedent must also be reduced by the amount of demand for such ser-

vices which his presence would have added to the overall housework. Thus, where the decedent is a "net consumer" of household services, no award for loss of services should be made.

The evidence indicates that this was precisely the situation with respect to Lavender. As Dr. Fitzgerald testified, and common experience confirms, where there is one bread-winner and one primary homemaker in a household, the bread-winner uses up more of the services performed by the homemaker than he contributes to the household (312a). Put differently, if the breadwinner is removed from the household, the homemaker has less work to do and the increased gain in time more than compensates for the loss of the breadwinner's services (376a). The one exception to this rule occurs when the services performed by the breadwinner are of such a nature that they cannot be performed by his spouse (312a, 380a). There is no evidence in the record that Lavender performed any such irreplaceable services, and the District Court therefore properly denied any award on this claim.

Nothing in the testimony of Dr. Berenson contradicts this conclusion, for as he conceded, Dr. Berenson made no effort to compute Lavender's consumption of household services or to subtract that amount from the value of the services he provided;* his calculation therefore produced an estimate of the gross rather than net loss of services caused by Lavender's death. Moreover, the evidence concerning decedent's contribution to household work is exceedingly sparse, and Dr. Berenson's estimate of its value,

* Appellant refers to Dr. Berenson's testimony that Lavender's total lifetime consumption would have been \$191,647 (210a). That reference is completely misleading, since the consumption being estimated was for personal expenditures and had nothing whatsoever to do with household services.

is clearly excessive. See *Cunningham v. Rederiet Vindeggen A/S*, *supra*, 333 F.2d at 312, where this Court affirmed the award of \$100 per year for the loss to plaintiff of her husband's household services.

E. The Awards Granted and Sustained In Other Cases Are Irrelevant.

As noted above in Point II, pp. 7-8, the fact that other factfinders in other wrongful death cases have granted higher awards and that such awards have been sustained by the trial or appellate courts is irrelevant to the issue before this Court. The District Court awarded appellant Lavender a sum which is fair and adequate under the facts of this case, and that award should be affirmed.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the District Court entered on June 15, 1977.

Dated: New York, New York
November 21, 1977

Respectfully submitted,

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County of New York) ss

Pauline P. Troia being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
2²
21st day of November 19 77 s he served a copy of the
within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

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